84-465

Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. LEE ROY BLACK,
Director of the Missouri Department of Corrections and Human Resources,
DICK D. MOORE,
Chairman, Missouri Board of Probation and Parole,
Petitioners,

v.

NICHOLAS J. ROMANO,
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

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No. 83-2000/2001-EM

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 83-2000

NICHOLAS JAMES ROMANO, *
*
Appellee, *
*
v. *
*
DR. LEE ROY BLACK AND *
DICK D. MOORE, *
*
Appellants. *

Appeal from the United States District Court for the Eastern District of Missouri

No. 83-2001

NICHOLAS JAMES ROMANO, *
*
Appellant, *
*
v. *
*
DR. LEE ROY BLACK AND *
DICK D. MOORE, *
*
Appellees. *

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: January 12, 1984
Filed: May 31, 1984

Reported at: 735 F.2d 319 (8th Cir. 1984)

Before ROSS, JOHN R. GIBSON, AND BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge

Appellants Dr. Lee Roy Black and Dick D. Moore of the Missouri Department of Probation and Parole appeal from the District Court's order granting Nicholas J. Romano's petition for a writ of habeas corpus. The District Court held that the sentencing judge denied Romano due process in failing to consider alternatives to incarceration before revoking Romano's probation. Romano v. Wyrick, 567 F.Supp. 882 (E.D.MO. 1983). We affirm the District Court's order. Romano cross-appeals, challenging the District Court's finding that one of the witnesses at the probation revocation hearing validly waived her privilege against self-incrimination. We need not discuss this contention, however, since our affirmance

of the District Court's order grants Romano all the relief he seeks.

I. Facts and Procedural History

On December 10, 1974, Romano was arrested for transferring and selling marijuana. A two-count indictment charging him with transferring and selling marijuana was issued. On November 15, 1976, Romano pled guilty to both counts before the Honorable Dean Whipple, Circuit Judge of the Twenty-Sixth Judicial Circuit of Missouri, sitting in Laclede County. On April 13, 1977, Romano was given a suspended sentence of two concurrent twenty-year prison terms and placed on probation for five years.

On June 15, 1977, Romano was involved in an automobile accident. He was arrested and charged with leaving the scene of an accident--a felony in the State of Missouri. At a probation

revocation hearing held on July 18, 1977, Judge Whipple revoked Romano's probation and imposed the two concurrent twenty-year suspended sentences. Romano began serving those sentenced immediately. The charge of leaving the scene of an accident was reduced later to careless and reckless driving, a misdemeanor, and Romano pled not guilty to that charge. On October 12, 1977, Romano was found guilty of careless and reckless driving and was fined one hundred dollars and costs.

On March 28, 1980, Romano filed with Judge Whipple a pro se motion for post-conviction relief under Mo. R. CRIM. P. 27.26 (Rule 27.26). In this motion Romano challenged the probation revocation proceeding. Judge Whipple denied this motion on July 11, 1980, holding that although a Rule 27.26 motion is the proper avenue for post-conviction relief in

Missouri, an exception to that rule is made when the challenged proceeding is one for probation revocation, in which case relief must be sought by way of a habeas corpus petition.

On the basis of Judge Whipple's ruling, Romano filed a petition for a writ of habeas corpus challenging his probation revocation. The petition was filed in the Circuit Court of Cole County, the county in which Romano was incarcerated. That court denied this petition and instructed Romano to file a Rule 27.26 motion in the county where he was convicted and sentenced. Acting on that instruction, Romano then petitioned the Laclede County Circuit Court for reconsideration of his motion for post-conviction relief. On August 27, 1980, Judge Whipple denied Romano any relief, restating the reasons given when he originally denied Romano's

27.26 motion. Romano then filed a notice of appeal with the Missouri Court of Appeals. The appeal was dismissed without opinion on February 3, 1981. On April 14, 1980, Romano filed a petition for writ of error coram nobis challenging the constitutionality of his reckless driving conviction. The petition was denied, and Romano filed a notice of appeal with the Missouri Court of Appeals. This appeal was dismissed on November 18, 1980 for failure to prosecute.

On June 13, 1981, Romano filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Missouri under 28 U.S.C. § 2254. In this petition he once again challenged the constitutionality of his reckless driving conviction. The petition was denied on October 2, 1981. The District Court reasoned that it was

powerless to affect Romano's incarceration since his petition challenged only the constitutionality of his probation revocation proceeding. A subsequent appeal by Romano had failed to exhaust state remedies. Romano v. Wyrick, 681 F.2d 555, 556-57 (8th Cir. 1982). On October 4, 1982, Romano filed a petition for a writ of habeas corpus with the Missouri Supreme Court challenging his probation revocation proceeding. The petition was denied without opinion on October 18, 1982.

Having exhausted his state remedies, on November 4, 1982 Romano again filed a petition for a writ of habeas corpus with the District Court under 28 U.S.C. § 2254, this time challenging the probation revocation proceeding. While the petition was pending, Romano was released on parole on December 17, 1982. The

District Court granted Romano a writ of habeas corpus on June 20, 1983, and ordered him released unconditionally from the custody of the Missouri Department of Probation and Parole. 567 F.Supp. at 887. The present appeals are from the judgment of the District Court.

II. Discussion

A. Adequacy of the Probation Revocation Hearing

The District Court held that Romano was denied due process when, during the probation revocation hearing, Judge Whipple failed to consider alternatives to imposition of the prison terms to which he previously had sentenced Romano. We affirm.

The revocation of probation for violation of a condition of probation is within the discretion of the sentencing judge. United States v. Rifen, 634 F.2d

1142, 1144 (8th Cir. 1980). If the sentencing judge determines that the probationer has "abused the opportunity granted him not to be incarcerated," the judge may revoke the probation. Schneider v. Housewright, 668 F.2d 366, 368 (8th Cir. 1981) (quoting United States v. Nagelberg, 413 F.2d 708, 709 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970)). In making this determination the government must present enough evidence "'to satisfy the [sentencing] judge that the conduct of the probationer has not met the conditions of the probation'" (United States v. Strada, 503 F.2d 1081, 1085 (8th Cir. 1974) (quoting United States v. Garza, 484 F.2d 88, 89 (5th Cir. 1973)); Ewing v. Wyrick, 535 S.W.2d 442, 444 (Mo. 1976). This is a far less stringent test than the reasonable doubt standard used in criminal trials.

In the instant case, it has been established by sufficient evidence that Romano violated the terms and conditions of his probation. The sentencing judge's analysis, however, should not end with the mere finding of a probation violation. The Supreme Court requires that a sentencing judge state the reasons for revoking probation in order to satisfy the due process requirements of the Fifth and Fourteenth Amendments. Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973) (citing Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972)). The revocation decision must include both a finding that the probationer violated a condition of his parole and that the probationer should be committed to prison. The Court considered such an analysis vital to preserving the function of the probation and parole systems. As the Court noted:

> Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion--the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

Id. at 785. Gagnon and Morrissey thus establish that "informed use of discretion" in a revocation proceeding must include consideration of alternatives to incarceration.[1]

---

[1]The following requirements for a parole revocation hearing were established in

Appellants Black and Moore note correctly that the sentencing judge in the present case made no statements as blatant as those made by the sentencing judge in Abel. We believe, however, that the Abel court did not intend any rigid formula for determining what constitutes

---

Morrissey:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses *unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489. Gagnon applied these requirements to probation revocation hearings. Gagnon, 411 U.S. at 782.

adequate consideration of alternatives to incarceration, but instead anticipated case-by-case analyses. Similarly, we must consider carefully the record here in order to determine if it shows compliance with the Constitutional standards established by Gagnon and Morrissey.

Our analysis of Judge Whipple's treatment of Romano, first at the sentencing hearing and later at the probation revocation hearing, leads us to conclude that Judge Whipple failed to consider any sanction other than incarceration for the probation violation committed by Roman. At the sentencing hearing Judge Whipple made the following statements to Romano in pronouncing sentence:

> [I]t is my intentions [sic] to assess punishment against

you of 20 years in the penitentiary and place you on parole [sic] for a period of five years and probably extend that for another five years for a total of ten years on probation with very strict rules. And a violation of any one of those rules will cause that parole [sic] to be revoked and you sent to the penitentiary . . . .

[Following enumeration of the special conditions of Romano's probation] Now, Mr. Romano, if I get any report back that you have refused any of these items, I will consider it a violation of this parole [sic]. . . . At

that time, I will issue a warrant for your arrest and order you held without bond until we can have a parole [sic] revocation hearing and if at that hearing it is proven that you did refuse to do any of these prescribed items or any of the general rules and conditions of a parole [sic] that are prescribed by Missouri Department of Probation and Parole, then you can anticipate that I will terminate this parole [sic] and order you transported to the reception center of the Missouri Penitentiary in Jefferson City to serve 20 years, do you understand me?

Trial Transcript at 46, 49-50. These statements alone given some indication that the sentencing judge was convinced from the state of the process that Romano was a high-risk candidate for probation.

Romano's marijuana conviction was his first felony offense. His only prior conviction came in 1967 for misdemeanor possession of an unspecified controlled substance, for which he was fined $50. During the 28 months between his arrest and sentencing in the present case his only violation was one traffic ticket for running a stop sign.

Although the pre-sentence investigation report noted that Romano had problems in dealing with authority figures, it also noted that his employers rated his work and work habits as good. One of these employers, Mike Atkinson, the

owner of the Stein Club bar, testified on Roman's behalf at the sentencing hearing.

The pre-sentence investigation recommended concurrent five-year sentences on each count. The prosecutor asked for concurrent ten-year sentences on each count. Instead, Judge Whipple gave Romano probation and concurrent twenty-year suspended sentenced on each count. Twenty years is the maximum sentence provided by Missouri law for this first offense.

The conclusory way in which the sentencing judge announced his decision to revoke Romano's probation provides evidence of his failure to consider alternatives to incarceration. Although significant evidence mitigating the seriousness of Romano's probation violation was presented at the hearing, the sentencing judge's decision does not even acknowledge that evidence. The

incident later determined to be a probation violation occurred outside of the Stein Club, Romano's former place of employment. Romano's car struck Timothy Bradley, a pedestrian with whom Romano was acquainted. Immediately after the incident, Romano stopped the car, let out two passengers, and drove away. The two passengers attended to Bradley. Ten hours after the accident, Romano visited Bradley in his hospital room to check on his condition. While it is true that Romano did not immediately report the accident and that he did leave the scene, given his other post-accident behavior it hardly can be said that he sought to escape responsibility for his actions. The facts do not compel a conclusion that Romano's effort at rehabilitation had failed or that he represented a danger either to himself or to society. A sentencing judge

might reasonably have concluded that continued probation, perhaps with additional conditions, was the proper alternative. The point, however, is not that Judge Whipple imposed incarceration, but that he did so without giving any indication that he considered any of the possible alternatives.

The District Court concluded as follows:

> Judge Whipple indicated to Romano that once it was determined he had violated a condition of his probation, he would terminate Romano's probation and send him to jail. The Court recognizes that such admonitions are commonly used by sentencing judges to inject fear of resulting consequences and

> discourage probation violations. But, when such statements are coupled with a record totally devoid of evidence showing that the judge considered alternatives to incarceration, there prevails a strong inference that the judge harbored a disposition to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options.

567 F.Supp. at 886. The District Court's analysis is consistent with the Missouri Supreme Court's decision in Abel, supra, and also is in keeping with the teaching of Gagnon and Morrissey that once an individual has been given the opportunity

to prove himself through probation or parole, due process protects the liberty interest inherent in that opportunity to the extent that it may not be ended without careful consideration of options other than active prison time.

B. The Remedy Granted by the District Court

The District Court noted that Romano's initial probation term was for five years. He had served only three months of that probationary period at the time his probation was terminated. After serving five and one half years in prison, Romano was released on parole. Appellants Black and Moore argue that, since the conditions of probation are significantly different from the conditions of incarceration, Romano should be returned to his status as a probationer.

The position advanced by appellants Black and Moore if adopted would result in the imposition of a cumulative penalty upon Romano requiring him to serve out the remainder of a five-year probation term, with the possibility of imposition of a further active prison term for a violation, all in addition to the five-and-one-half years he has served in the Missouri State Penitentiary plus one-and-one-half years of conditional freedom while on parole. The District Court, in the sound exercise of its discretion, did not choose to blind itself to the time Romano had served in the custody of the State of Missouri. The District Court noted:

> The Court agrees that conditions of incarceration are different from conditions of probation. The rigors and

> stress associated with imprisonment are far greater than those of probation. The Court finds that Romano has now met the requirement of the law, and hereby orders that he be released from the custody of the Missouri Department of Probation and Parole.

567 F.Supp. at 887. We hold that the District Court did not abuse its discretion in granting this remedy. See Iasigi v. Van de Carr, 166 U.S. 391 (1897).

The order of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT.

NICHOLAS JAMES ROMANO,)
)
Petitioner,)
)
v.)
)
DR. LEE ROY BLACK, and)
DICK D. MOORE,)
)
Respondents.)

No. 82-1303C(4).

United States District Court,
E.D. Missouri, E.D.

June 20, 1983

CAHILL, District Judge

Reported at 567 F.Supp. 882 (8th Cir. E.D. 1983)

This matter is before the Court on Nicholas James Romano's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Romano claims in his petition that the Honorable Dean Whipple, a Missouri state judge in Laclede County, Missouri, abused his discretion by revoking Romano's probation. Romano alleges two points of error. Romano first alleges that Judge Whipple violated his rights of due process under the Fourteenth Amendment to the United States Constitution when he revoked Romano's probation without considering alternatives to incarceration. Secondly, Romano claims that Judge Whipple violated his due process rights by allowing the material testimony of Jody Seificas, a witness at Romano's probation revocation hearing in

violation of the witness' right against self-incrimination.

I

In November, 1976, Romano pleaded guilty to two counts of an indictment that charged him with transferring and selling a controlled substance. In april, 1977, Judge Whipple sentenced Romano to two concurrent twenty year terms of imprisonment but suspended execution of the sentence and placed him on probation for a period of five years. Romano had been on probation for about three months when Judge Whipple revoked his probation and ordered Romano to begin serving the twenty year prison term. However, Romano was later paroled after serving five and one-half years in jail. Romano still maintains that the revocation of his probation was improper and seeks release from the custody of the Missouri

Department of Probation and Parole. The Court recognized that there was insufficient basis in the record upon which to render an informed decision on Romano's habeas petition. So, the Court held an evidentiary hearing to allow the parties to adduce additional evidence and testimony on this matter. The parties chose not to present testimony and relied solely on the attorney's oral argument. For the reasons discussed below, Romano's petition for writ of habeas corpus is granted.

Along with the generally accepted conditions of probation, Judge Whipple placed Romano on probation with three special conditions: (1) Romano had to submit a drug screen test on demand, (2) his travel was restricted to Boone County, Missouri, unless he obtained prior permission to travel elsewhere, and (3)

Romano had to allow any law enforcement officer to search his personal property at any time. (Tr. at 49, 50). The record is clear that Judge Whipple placed Romano on probation despite the contrary recommendation of the State and the presentence investigation report. But Judge Whipple stated to Romano that

> If . . . it is proven that you did refuse to do any of these prescribed items or any of the general rules and conditions of a parole that are prescribed by the Missouri Department of Probation and Parole, then you can anticipate that I will terminate this parole and order you transported to the reception center of the Missouri Penitentiary in

Jefferson City to serve twenty years, do you understand me?

On June 15, 1977, Romano was involved in a car accident that injured his acquaintance, Timothy Bradley. The sequence of events that followed that accident is somewhat bizarre at best. After the accident Romano was arrested and charged with the felony of leaving the scene of an accident pursuant to Mo.Rev.Stat. § 577.060. Later, the Boone County assistant prosecuting attorney filed an information charging Romano with leaving the scene of the June 15 accident. The information was subsequently amended to charge Romano with the misdemeanor of careless and reckless driving. On July 18, 1977, Judge Whipple revoked Romano's probation after holding a hearing on that issue and imposed the original twenty year

sentence for Romano's underlying drug conviction. Romano was ultimately found guilty of the misdemeanor of careless and reckless driving and was fined $100 plus court costs.

Romano was represented by two lawyers at the probation revocation hearing where many witnesses testified about the June 15, 1977 accident. Witness Gerald Saunders stated that he was in front of the Stein Club in Columbia, Missouri, at approximately 2:00 o'clock A.M. on the day of the accident when he saw a car fitting the description of Romano's automobile swerve into the parking lot of the club and strike Timothy Bradley. Saunders also testified that after the car stopped Jody Seificas and Terry DeHaven emerged from the car and then the automobile drove away. (Tr. at 72.) Saunders further sated that DeHaven later told him that Romano

was the driver of the automobile. (Tr. at 77).

Larry Wright, a police officer who investigated the June 15 accident, testified that he questioned Seificas about the incident and that she told him that Romano was the driver of the car. (Tr. at 87.) Furthermore, Ann Bradley, James F. Bradley, and Colleen Hilbert, the accident victim's mother, father, and sister respectively, all testified that while visiting Timothy Bradley in the hospital Romano came into the hospital room and stated in essence "Why did you jump in front of me" or "It's too bad you jumped in front of me." (Tr. at 102, 107, and 113 respectively.)

Jody Seificas was called to testify at the revocation hearing but continually refused to answer any questions on Fifth Amendment grounds. However, the following

discussion took place between the state's attorney and Seificas.

> Q. by Seitz: Mrs. Seificas, you previously testified and an officer testified to certain statements attributable to you. Now, I'm going to relate those to you. He's testified, you're under oath, that he talked with you the night of this accident and that you told him you were a passenger in the car. Do you admit or deny that?
>
> A. by Seificas: I admit that. (Tr. at 116-17).

The court did not hear Seificas' answer and directed the court reported to reread the question. After the court reporter read the question, Seificas again refused

to answer on Fifth Amendment grounds claiming that she did not understand the question when the state's attorney first posed it to her.

Judge Whipple then entered his findings of fact and concluded that Romano's probation should be revoked. Paragraph 8 of the findings reads: "The Court rules that witness Jody Seificas intelligently understood the questions and knowingly answered the questions and thereby waived the Fifth Amendment constitutional right against self-incrimination and her answer is considered as material in assisting the Court in determining that defendant (Romano) did in fact drive the automobile that struck Timothy Bradley." But, nowhere in the record before this Court, including the transcript of Romano's revocation hearing, is an indication that Judge Whipple

considered what alternatives were available that might be more appropriate than sending Romano to jail for twenty years. The next part of this story is somewhat extraordinary.

Seeking post-conviction relief, Romano filed a pro se motion in the Circuit Court of Laclede County, Missouri, pursuant to Mo.S.Ct.R. 27.26, challenging the probation revocation proceeding. Judge Whipple denied Romano's Rule 272.6 motion because Missouri case law holds that while Rule 27.26 has effectively displaced the state's habeas corpus petition in most cases, probation revocation is an exception to the general rule. Judge Whipple held that the proper remedy lay in a habeas corpus petition. Romano then filed a petition for writ of habeas corpus challenging the probation revocation in the Cole County Circuit

Court, the county of his incarceration. But, Cole County Circuit Judge James T. Riley denied Romano's petition. Judge Riley held that Romano had to file a Rule 27.26 motion in Laclede county where Romano was convicted.

Romano then returned to Laclede County and filed a motion for reconsideration and cited Judge Riley's opinion in support. Judge Whipple again denied Romano's motion and restated the same basis for his ruling as set forth in his original denial of Romano's Rule 27.26 motion filed earlier. Romano then appealed Judge Whipple's ruling in the Missouri Court of Appeals, Southern District, but the appeal was dismissed. Romano next filed a petition for writ of error coram nobis, challenging his reckless driving conviction. That writ was denied. Romano appealed the denial of

the coram nobis writ to the Missouri Court of appeals, Eastern District, but the Court of Appeals dismissed his cause for failure to prosecute.

Romano next filed a petition for writ of habeas corpus with the Honorable John F. Nangle in this district. Judge Nangle adopted the opinion of the Honorable William S. Bahn, United States Magistrate, taht held that the federal court did not have jurisdiction to hear Romano's claim. Romano appealed Judge Nangle's decision to the United States Court of Appeals for the Eighth Circuit but the Eighth Circuit held that Romano had not fully exhausted his available state remedies. The Eighth Circuit noted that Romano could still obtain relief in the state court by filing a habeas corpus petition with the Misosuri Supreme Court. In October, 1982, Romano filed a habeas writ with the Missouri

Supreme Court challenging his probation revocation proceeding bu the Missouri court denied Romano's petition without an opinion. Romano finally filed another petition for writ of habes corpus on which the Court is ruling today.

II

[1-3] The Court initially recognizes that whether to revoke a party's probation because that party violated a condition of his probation is left to the sound discretion of the sentencing judge. United States v. Rifen, 634 F.2d 1142, 1144 (8th Cir. 1980); United Sates v. Alari, 439 F.2d 1349, 1351 (8th Cir. 1971). The sentencing judge need only satisfy himself that the party on probation "abused the opportunity granted him not to be incarcerated." Schneider v. Housewright, 668 F.2d 366 (8th Cir. 1981). Moreover, the burden of proof involved in

a probation revocation proceeding is not as great as that required to convict a person of a crime. United States v. Burkhalter, 588 F.2d 604 (8th Cir. 1978). But, the sentencing judge has two considerations in ruling on a probation revocation, (1) whether the defendant has violated a condition of his probation, and (2) if there are any alternatives to incarceration. Gagnon v. Scarpelli, 411 U.S. 778, 784, 93 S.Ct. 1756, 1760-61, 35 L.Ed.2d 656 (1973); Morrissey v. Brewer, 408 U.S. 471, 479, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972). The decision of the sentencing judge to revoke probation cannot be merely a reflexive reaction to technical violations of conditions imposed, because the whole trust of the probation-parole movement is to keep men in the community working with adjustment problems there, and using revocation only

as a last resort when treatment has failed or is about to fail. United States v. Burkhalter, at 606, citing Gagnon v. Scarpelli, 411 U.S. at 785, 93 S.Ct. at 1761.

[4-6] The Court finds, based on the record before the bench and the evidence as stated above in this memorandum, that Judge Whipple did not abuse his discretion in finding that Romano was the driver of the automobile that caused the accident on June 15, 1977, and, thus, committed a crime and violated his probation. Furthermore, the Court finds that even if Judge Whipple improperly considered the testimony of Jody Seificas in reaching a decision to revoke Romano's probation, such consideration was harmless error. Kartman v. Parratt, 535 F.2d 450, 454 (8th Cir. 1976). In light of the remaining evidence that ended to implicate Romano as

the driver of the automobile in the June 15 accident, Judge Whipple likely would have reached the same result even it he had excluded the answer of Seificas. The only error that this Court finds with the revocation hearing held by Judge Whipple is the lack of consideration of alternatives to incarceration. However, the Court finds that such lack of consideration is a fatal flaw that resulted in an abuse of discretion and, therefore, Judge Whipple's deicsion must be overturned. Abel v. Wyrick 574 S.W.2d 411, 419 (Mo. 1978).

The Missouri Supreme Court in Abel v. Wyrick addressed this issue involving the due process requirements for a probation revocation hearing. In Abel, the judge that revoked the defendant's probation had failed to consider alternatives to incarceration before sending the defendant

to jail. Similarly to the attitude displayed by the able Judge Whipple in this case, the judge in Abel sated "The only thing I'm interested in is what you have told me; you violated your probation." The judge continued by stating "There is no use wasting any more time, I'm going to revoke your probation." Although the Missouri high court recognized that in many cases no workable alternatives to incarceration may present themselves, as where a probationer previously convicted of burglary has again committed the same or a similar offense, it concluded that other alternatives were certainly worthy of consideration in that case. 574 S.W.2d at 419. The Missouri court concluded by stating.

> It is clear that the judge did not consider alternatives to incarceration or the

> relative benefits of incarceration to petitioner and to society, as opposed to the benefits of some alternative treatment, but simply decided to incarcerate on the basis of the broken conditions of probation themselves. On these facts, this was an abuse of discretion.

As mentioned above, Judge Whipple indicated to Romano that once it was determined that he had violated a condition of his probation, he would terminate Romano's probation and send him to jail. The Court recognizes that such admonitions are commonly used by sentencing jduges to inject fear of resulting consequences and discourage probation violations. But, when such

statements are coupled with a record totally devoid of evidence showing that the judge considered alternatives to incarceration, there previals a strong inference that the judge harbored a dispostion to send Romano to jail for any probation violation, regardless of the nature of the violation and without regard to any other possible options. Here, Romano was convicted of a misdemeanor that resulted in the injury of Romano's personal friend. Certainly, since the underlying conviction was for a drug offense, alternatives to incarceration should have been considered, on the record, and if Judge Whipple decided still to send Romano to jail, he should have given the reasons why the alternatives were inappropriate. The Court doesnot attempt to exhaust the full range of alternatives that were available to Judge

Whipple, but surely he could have considered public service work, mandatory driver's training classes, or even restitution to Timothy Bradley and his family as viable options. Then if Judge Whipple had still decided to send Romano to jail and stated his reasons for doing so, there would have been prima facie evidence of his deliberations. But under these circumstances the court finds that Judge Whipple abused his discretion by sending Romano to jail without exporing other alternatives that would have better benefited Romanc, the victim, and society, considering the offense for which Romano's probation was revoked and the nature of the conduct leading to revocation.

This Court knows all too well the pressures of time and the frustrations of a beleaguered trial judge whose patience and understanding are taxed to the utmost

in his everyday assignments. Small wonder, then, that the tolerance of the trial judge grows thin when an individual who has been once given a chance to escape imprisonment violates the terms of his probation immediately afterward. But it is really the trial judge who must gauge the measurements of the judicial system, and who must therefore, resist the temptation to overkill.

Of necessity, the appellate courts deal with principles of law and broad verities of truth; they cannot easily evaluate personal distinctions. But the trial judge has a man of flesh and blood before him; he must weigh and measure the effect of judicial decisions, not only on the victim but on the defendant and the community. The scales must be graded in grams and not in tons.

Therefore, the learned trial judge must recollect the circumstances of the sentencing, the factors invovled in the acts leading to revocation, and must consider the alternatives to an original prison sentence. While a busy trial judge is not expected to be encyclopedic in his enumeration of alternatives, it is hardly sufficient merely to recite a mechanical phrase that alternatives were considered. The better policy is for the tiral judge to share his evaluation sa to the inadequacy of alternatives so as to clearly and unequivocally show that he has actually given thought to other approaches besides the original sentence, especially when, as in this matter, the sentence was for a lengthy prison term, while the actions leading to the revocation could only have resulted in minor punishment had the defendant not been on probation.

This Court holds that in the absence of material testimony, agreement of counsel, or specific response to a pleas from the defendant for alternatives to revocation and sentence, the trial court must express a rudimentary explanation for the rejection of alternatives. A record devoid of anything but a mere recital that alternatives had been considered and denied does not comport with justice. But here there is not even a naked assertion of the rejection of alternatives. This Court is not convinced that the harassed trial judge gave judicial thought to the alternatives to incarceration.

The Court's next step is to fashion a remedy for Romano. As stated earlier, Romano had served only about three months of his probationary period before Judge Whipple revoked his probation. Romano then served five and one-half years in the

custody of the Missouri Department of Corrections at the Jefferson City penitentiary. The court's finding today that Judge Whiple abused his discretion by revoking Romano's probation without considering alternatives to icnarceration places Romano back in the position he would have been in had probation not been revoked--on probation. Since Romano spent over five years in jail the Court finds that the probationary period has now expired. Respondent argues that if the court grants the habeas writ, the Court should place Romano back on probation and allow him to serve its duration, which is four years and nine months. Respondent maintains that conditions of probation are different from conditions of incarceration and therefore the Court should not allow time spent in the custody of the Missouri department of Corrections to apply toward

Romano's probationary period. The court agress that conditions of incarceration are different from conditions of probation. The rigors and stress associated with imprisonment are far greater than those of probation. The Court finds that Romano has now met the requirement of the law, and hereby orders that he be released from the custody of the Missouri Department of Probation and Parole.

Romano's petition for writ of habeas corpus is granted.

ORDER

In accordance with the memorandum filed this day and incorporated herein,

IT IS ORDERED that Nicholas James Romano's petition for writ of habeas corpus is GRANTED.

United States Court of Appeals
for the Eighth Circuit

83/2000/2001-EM	*
September Term,	
NICHOLAS JAMES ROMANO,	*
	*
Appellee/Cross Appellant,	*
	*
VS.	*
	*
DR. LEE ROY BLACK AND	*
DICK D. MOORE,	*
	*
Appellants/Cross Appellees.	*

Appeals from the United States District Court for the Eastern District of Missouri

Petition of appellants/cross appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

June 28, 1984